ABDUL SAMAD HJ. ALIAS & ANOR.

v.

PUBLIC BANK BHD. & ANOR.

FEDERAL COURT, JOHOR BAHRU
SALLEH ABAS LP
WAN SULEIMAN FJ
HASHIM YEOP SANI FJ
[CIVIL APPEAL NO. 100 OF 1983]
3 OCTOBER 1984

REVENUE LAW: *Sales tax - 4 year delay by Director General of Customs in responding to receivers' notice for unpaid sales tax - Ranking of creditors' claims.*

CIVIL PROCEDURE: *Garnishment proceeding - Director General of Customs absent in said proceeding before Judicial Commissioner - Whether Judicial Commissioner wrong in not applying O. 49 r. 6 of the Rules of the High Court - Whether wrong in holding appellants as functus officio.*

COMPANY LAW: *Receivership - Duties of receivers - Whether appellants functus officio.*

The appellants were appointed as receivers and managers of Koford Paper Industries Sdn. Bhd. in 1978. A balance sum of RM38,702.66 was paid into the debtor company's account. The garnishee and the intervenor made claims against the said sum which was subsequently paid into Court.

Upon appointment as receivers and managers, the appellants gave due notice of their appointment to the Director General of Customs for any claims for unpaid sales tax. In 1982 (4 years' delay) the Director General of Customs replied that Koford Paper Industries Sdn. Bhd. still owed the government a sum of RM41,511.12 as unpaid sales tax. Alarmed by the letter the appellants prayed to the High Court that the sum deposited in Court be paid to the Director General of Customs in settlement of the unpaid sales tax. In response to the prayer, the garnishment proceeding in Civil Suit No. 8/1980 was set down for hearing in March 1983 and notice of hearing was given to all concerned in the garnishment. When the garnishment proceeding came before the learned Judicial Commissioner, the Director General of Customs was absent.

The learned Judicial Commissioner absolved the appellants from any liability as the claim by the Director General of Customs was made when the appellants had completed their duties as receivers. The appellants were *functus officio* by 28 February 1981. The appellants were held to have no *locus standi* in the garnishment proceedings. The Judicial Commissioner ordered the said sum to be paid to the garnishee and the intervenor. The appellants appealed.

Held:

[1] The power to make an order or not conferred by O. 49 r. 6 is a discretionary and equitable one. Since the Customs did not respond to the Court's notice of hearing and did not attend the garnishment proceeding, no order could have been made in their favour under O. 49 r. 6.

[2] The appellants had *locus standi* as they received the Court's notice of hearing and since they were former receivers, the Court was entitled to hear the appellants on any matter concerning the distribution of the money, subject of the garnishment proceeding.

[3] The appellants were *functus officio* by 28 February 1981 as they had ceased to be receivers upon filing Form 60 under s. 186(2) of the Companies Act 1965.

[4] The appellants are absolved from liability as they have not defaulted under s. 192 of the Companies Act, 1965 and have complied with s. 70 of the Sales Tax Act 1972.

[Appeal dismissed with costs.]

Case referred to:
Roberts v. Death [1882] 8 QBD 319

Legislation referred to:
Sales Tax Act 1972, s. 70(1), (2)
Rules of the High Court 1980, O. 49 r. 6
Companies Act 1965, ss. 186(2), 192(1), (2)

Other source referred to:
Halsbury's 3rd Edn. Vol. 32 para. 725

For the appellants - A. Kanesalingam; M/s. Kanesalingam & Co.
For the 1st respondent - Derek G. Thambyah; M/s. H.H. Long & Co.
For the 2nd respondent - Nagarajah Muthiah; M/s. Shook Lin & Bok

JUDGMENT

Hashim Yeop Sani FJ:

The appellants were appointed receivers and managers of Koford Paper Industries Sdn. Bhd., judgment debtor, by Messrs. Kwong Lee Bank Bhd. secured creditors pursuant to the terms of a debenture dated 3 June 1978. A sum of RM38,702.66 was subsequently paid into the debtor company's account being excess amount after realisation of assets and settlement of costs of realisation and amounts owing to secured creditors. A garnishment order dated 31 July 1982 was obtained at the instance of the first respondent, Public Bank Bhd. The other claimant was the intervenor (MIDF) whose application to intervene had been allowed. On 23 November 1982 the said sum was paid into Court.

Upon being appointed receivers and managers, the appellants gave due notice of their appointment to the Director General of Customs for any claims for unpaid sales tax or customs duties. On 26 November 1982 the appellants received a letter dated 23 November 1982 from the Director of State Customs, Sales Tax Branch, Kuala Lumpur notifying the appellants that Koford Paper Industries Sdn. Bhd. was still owing the government a sum of RM41,511.12 as unpaid sales tax for period November 1976 to October 1979. The letter cited s. 70(1) and (2) of the Sales Tax Act, 1972 which reads as follows:

> 70.(1) Where a receiver is appointed of the property of a licensed manufacturer the receiver shall give notice thereof to the Director General within fourteen days thereafter, and shall before disposing of any of the assets as appears to the Director General to be sufficient to provide for any sales tax that will thereafter become payable in respect of the goods that have been sold or manufactured by the licenced manufacturer before the appointment of the receiver.
>
> (2) A person appointed as receiver who fails to give notice to the Director General within the time specified in subsection (1) or fails to provide for payment of the sales tax as required by that subsection shall be personally liable for any sales tax that is or becomes payable as aforesaid.

The letter from the Customs ended with a notice to the appellants to settle the amount within fourteen days from the date of the receipt of the letter in default legal action under the Sales Tax Act 1972 would be taken. According to the learned Judicial Commissioner this letter from the Customs was written more than four years after the appellants had notified the Customs of the appointment but we are unable to find a copy of the notice in the record of appeal.

Be that as it may the appellants must have been alarmed by the notice from the Customs and their solicitors wrote a letter to the Senior Assistant Registrar, High Court, Johore Bahru on 23 December 1982 the material parts of which reads as follows:

> Our clients were formerly the receivers and managers of Koford Paper Industries Sdn. Bhd.
>
> We are instructed that pursuant to a garnishment in Civil Suit No. 8 of 1980 in the High Court at Johore Bahru and Civil Action 178 of 1981 in the Magistrate's Court at Kuala Lumpur a sum of money has been paid to you to be paid out to some creditors of the defendant company.
>
> Our clients have now received a claim for RM41,511.12 being sales tax from the Department of Customs which is a claim ranking in priority to the claims by other creditors.
>
> Kindly stop payment of any monies to other creditors and please settle the sales tax claimed by the Department of Customs Kuala Lumpur.

There was also an affidavit sworn on 22 December 1982 by the appellants stating the history of the garnishment proceeding and a prayer that the amount deposited in Court be paid to the Director-General of Customs in settlement of the debt as aforesaid. Apparently as a result of this letter the Court set down the matter of the garnishment proceeding in Civil Suit No. 8/1980 for hearing on 12 - 15 March 1983 *vide* High Court notice dated 2 January 1983. This notice was addressed to all concerned in the garnishment and also to the Director of State Customs, Sales Tax Branch, Kuala Lumpur who had sent the notice to the appellants earlier. When the matter came before the learned Judicial Commissioner on 12 March 1983 neither the Director General of Customs nor his representative was present.

The Judicial Commissioner held that the appellants had been *functus officio* as receivers and managers but agreed to hear their Counsel, Mr. Kanesalingam as *amicus curiae*. The Judicial Commissioner also held that the Customs submitted their claim for the amount of sales tax unpaid more than four years after they were notified by the appellants to do so and the claim was made only after the appellants had completed their duties as receivers.

The learned Judicial Commissioner in his judgment however absolved the appellants from any guilt of any breach of their duties as receivers and accordingly made an order to pay out the sum in Court to the judgment creditor, the intervenor, and towards party and party costs. The application of Mr. Kanesalingam was refused on the ground that he had no *locus standi* in the matter.

There are many grounds of appeal but central to all the grounds are the following fundamental issues namely whether the learned Judicial Commissioner was wrong in not taking any step under O. 49 r. 6 of the High Court Rules, 1980 and secondly whether the learned Judicial Commissioner was wrong in holding that the appellants were *functus officio* by 28 February 1981.

First on O. 49 r. 6 of the Rules of the High Court, 1980. This rule is adopted from the English equivalent. The words "it is brought to the notice of the court" in r. 6(1) taken from the corresponding English provision gave effect to the decision in *Roberts v. Death* [1882] 8 QBD 319. It was held in that case that a garnishee order *nisi* ought not to be made absolute if it be suggested and if there is reasonable ground for so suggesting that the money sought to be attached is trust money.

The words "the court may order" in O. 49 r. 6(1) give discretion to the Court to order that the person who claims to be entitled to the debt sought to be attached attend before the Court and to state the nature of the claim with particulars thereof. Even if we regard in the instant case that it had been brought to the notice of the learned Judicial Commissioner that the Customs were interested in the sum garnished, one would not fail to notice that neither the Director-General of Customs nor his representative was present before the Court on the date set out in the notice sent out by the Court. Thus if the notice dated 2 January 1983 sent out by the Court is regarded that the Customs did not respond to the notice and therefore no order could in any case have been made in their favour under O. 49 r. 6.

The second issue is the question of *locus standi* of the appellants. We do not agree with the learned Judicial Commissioner that the appellants had no *locus standi*. Mr. Kanesalingam, Counsel for the appellants, was one of those to whom the notice of hearing dated 2 January 1983 was addressed by the Court. The appellants were former receivers and the Court was perfectly entitled to hear the appellants on any matter concerning the distribution of the money, subject of the garnishment order. It is however different altogether from saying that Mr.Kanesalingam had no *locus standi* to be before the learned Judicial Commissioner on behalf of the Director General of Customs as he was never retained by the Customs.

The undisputed facts show that the appellants had ceased to be receivers and that they had filed Form 60 under s. 186(2) of the Companies Act, 1965 on 28 February 1981. The appellants were accordingly *functus officio* as from that date and therefore no longer acting as receivers and managers on the date that they received the letter from the Customs stating the claim for unpaid sales tax.

Under the Companies Act, s. 192 provides for the enforcement of duty of a receiver. Subsection (1) provides that if a receiver and manager of a company makes any default in making or lodging any return account or other document or in giving any notice required by law and fails to make good the default within fourteen days after the service of a notice, the Court may make an order directing him to make good the default. Subsection (2) provides that if it appears that any receiver or manager has misapplied or retained or become liable for any money or property of a company, the Court may on the application of any creditor, compel him to repay or restore the property. It is clear to us that the appellants had neither made any default nor misapplied any property of the company to be liable under s. 70 of the Sales Tax Act 1972. They had complied with the requirement of giving due notice to the Director-General of Customs. But unfortunately this notice was not responded to by the Customs until after four years later when the appellants had already ceased to act as receivers. A receiver would ordinarly be liable only if it be shown that he has not acted with perfect regularity or has not used a degree of prudence as would be expected from a private individual in relation to his own affairs. See also *Halsbury's* Third Edn., Vol. 32, para. 725.

Finally it would seem settled and accepted as such by Brett LJ in *Roberts v. Death* that there is discretion of a Court to make an order or not under O. 49 r. 6 as it is an exercise of an equitable power. In the circumstances of this case we do not think it was wrong for the learned Judicial Commissioner to have made the order as he did.

We will accordingly dismiss the appeal with costs. Deposit to respondent to account of taxed costs.

Also found at [1984] 2 CLJ 264